Filed 10/19/09 P. v. Quijano CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARIA QUIJANO, Defendant and Appellant.	B207955 (Los Angeles County Super. Ct. No. LA048968)

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed.

Ralph H. Goldsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Stephanie A. Miyoshi, Stacy S. Schwartz and Blythe Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Maria Quijano[1] (Quijano) appeals from a judgment entered after a jury returned a verdict of guilty against her for count 1, conspiracy to commit first degree murder (Pen. Code, § 182, subd. (a)(1))[2] and count 2, first degree murder (§ 187, subd. (a)). The jury found true the allegation as to both counts that Quijano and her codefendants committed the murder for financial gain within the meaning of section 190.2, subdivision (a)(1). The jury also found true the allegation that as to both counts a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1).

The trial court sentenced Quijano to life without the possibility of parole on count 2, plus one year for the firearm enhancement. The sentence of 25 years to life plus one year for the firearm enhancement on count 1 was imposed and stayed pursuant to section 654. We affirm the judgment.

CONTENTIONS

Quijano contends that: (1) the trial court erred by failing to instruct the jury that it could convict her of the target offense of aggravated assault if it had a reasonable doubt concerning her intent to have Reynaldo killed; (2) the trial court erred in erroneously instructing that a person who aids and abets is "equally guilty" of the crime committed by a perpetrator; (3) the trial court erred by giving a modified financial gain special circumstance instruction; and (4) the trial court failed to fully instruct the jury concerning its authority to convict Quijano of the lesser included offense of second degree murder.

FACTS AND PROCEDURAL BACKGROUND

Viewing the whole record in the light most favorable to the judgment below as we must (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139), the evidence established the

---

1 Codefendants Rene Oscar Alvarado (Alvarado), Wilson Aron Sanchez (Sanchez), Pablo Anthony Alvarenga (Alvarenga), and Erik Monroy (Monroy) are not parties to this appeal. Sanchez, Alvarado, and Quijano were tried separately and each have appeals pending before this court. Monroy and Alvarenga pled guilty to voluntary manslaughter in exchange for their testimony. Monroy and Alvarenga received 22-year prison terms.

2 All further statutory references are to the Penal Code unless otherwise indicated.

following. Quijano was married to Reynaldo Quijano (Reynaldo). On April 10, 2005, Reynaldo was shot to death in the early morning hours as he was stopped at an intersection in his brown Mercedes near Stagg Street in Sun Valley. That morning, Silvia Tejeda (Tejeda) returned home from work to Stagg Street between 12:10 and 12:15 a.m. She noticed a brown van with a covering on the driver's side rear window parked in a red zone under a street light. She parked her car, then heard three gunshots as she opened her door. She ran to her house and saw a young man, about five feet nine inches tall, weighing approximately 160 pounds, and wearing a black hooded sweatshirt running toward the intersection. She saw that young man jump into the van. She noticed a car stopped at the intersection with the lights on and a man's body hunched over the steering wheel inside the car. Tejeda called 9-1-1. Tejeda later identified the brown van through photographs taken by the detectives. Ethan Selzer, who lived two houses down from Reynaldo, heard three to five gunshots at 12:13 a.m. from the intersection of Stagg Street and Arcola. He then heard a vehicle accelerate away.

Los Angeles Police Department Officer Martin Higuera, who responded to the scene of the crime, found a gas bill near Reynaldo's car addressed to Cecilia Arias (Arias). Fresh vehicle fluid was on the ground in the same area where the bill was found. Four expended nine-millimeter shell casings were found in the street, and a nine-millimeter bullet was recovered from the driver's seat of the Mercedes. A medical examiner determined that Reynaldo died of multiple gunshot wounds that were consistent with his being seated in the driver's seat of a vehicle, shot from left to right. One bullet entered the left nipple area and exited the body on the right side. Another entered the left lung and traveled through to the right lung. Other bullets hit the left armpit and left wrist.

Arias testified that Sanchez, who was the boyfriend of her daughter Claudia Jimenez (Jimenez), lived at Arias's house. She also identified photographs of the brown van as the one belonging to Sanchez. Fingerprints matching those of Alvarenga, Monroy, and Sanchez were later lifted from the brown van. Pedro Villegas (Villegas), Sanchez's stepfather, was the owner of the van. He had loaned it to Sanchez in April 2005. The

van leaked power steering fluid and had a broken rear window on the driver side that Villegas had taped over with plastic. On April 20, 2005, detectives surveilled the van as Sanchez, Jimenez, Joe Martinez, and Alvarenga retrieved a green Toyota Camry that had been impounded for a missing license plate. Shortly before the murder, Jimenez gave Sanchez a utility bill so that he could get a library card.

Anthony Torres (Torres) testified that he was with Alvarenga at a parking lot on 84th Street when Sanchez drove up in a brown van. Torres heard Sanchez, Monroy, and Alvarenga talking about getting a gun to do a mission to make some money. Sanchez invited Torres to join them, but Jose Luis (Luis), a friend of Torres's, drove up, and Torres got into Luis's car. Torres saw Sanchez, Monroy, and Alvarenga drive away in the brown van.

William Bailey (Bailey) testified that in April 2005, he was visited by Sanchez, who gave him a sealed envelope to keep safe. Sanchez told him there was $9,000 inside the envelope. Bailey joined Sanchez, Monroy, and Alvarenga in Sanchez's van, where they drank beer and smoked marijuana. Monroy told Bailey that they killed a man on behalf of a woman who wanted her husband killed for abusing her daughter. He told Bailey that they waited for the guy to come out and they shot him. They got paid for the murder. Sanchez confirmed the story.

Quijano had a 31-year-old son by a prior marriage named Antonio Hernandez (Hernandez). Hernandez testified that his mother suspected that Reynaldo was having an affair. Hernandez had moved out of the house about four months before the murder. Hernandez testified that Reynaldo was a truck driver, who usually left the house at 6:00 a.m. and returned at 9:00 p.m. Reynaldo was scheduled to drive his truck to El Salvador the day after the murder. On the night of the murder, around 10:40 p.m., Hernandez dropped a key off at the house. He saw Reynaldo's brown Mercedes parked in front of the house where he typically left it.

A claims executive from Primerica Life Insurance Company testified that in 1993, Quijano and Reynaldo had purchased life insurance policies naming each other as

primary beneficiaries. On April 12, 2005, Quijano contacted a claims agent to report Reynaldo's death. She did not mention that Reynaldo had been shot to death. On April 22, 2005, Quijano signed a claim form requesting the proceeds of the policy. In 2005, the face value of the policy was $225,000.

An executive from Washington Mutual testified that Quijano had withdrawn $37,833 from her bank accounts between September 2004 and April 2005. Another large withdrawal of $26,000 had been deposited to the account of Quijano's son, Hernandez. Cash withdrawals of $8,440 could not be traced to subsequent withdrawals.

Felix Penate (Penate) purchased a cell phone for Alvarado, who was his wife's uncle. A detective conducting surveillance of Alvarado after the murder called him at the cell phone number for the phone purchased by Penate. When Alvarado answered the call, the detective hung up.

A T-Mobile records custodian testified that on April 2, 2005, four calls were made from Quijano's cell phone to Alvarado's cell phone. On April 3, 2005, there were 22 calls from Quijano to Alvarado. On April 9, 2005, there were numerous outgoing calls ranging from one minute to seven minutes long. The seven-minute call occurred at 11:18 p.m. From 4:20 p.m. on April 9, 2005, until 12:40 a.m. on April 10, 2005, Quijano's cell phone made 20 calls to Alvarado's cell phone. Quijano's cell phone remained at one location.

A Verizon Wireless custodian of records testified that Alvarado made at least eight phone calls from April 9, 2005, to April 10, 2005. Alvarado's phone was used to call Monroy's mother, Monroy's girlfriend, and Alvarenga's mother. Alvarado's cell phone moved from south central Los Angeles to North Hollywood, which is near Sun Valley. It then moved back to South Central Los Angeles.

Quijano's interviews

On April 10, 2005, at 3:40 a.m., detectives spoke to Quijano and her then 17-year-old daughter, Dilcia Preza (Preza). Quijano said that she was asleep when the shooting occurred. She did not hear any gunshots. She stated that she had a good relationship

with Reynaldo, but she suspected that he was having an affair. She told the detectives that she had received annoying telephone calls from Reynaldo's mistress up to and including the day of the murder. She said the last person she spoke to before she went to bed was her son, Hernandez, at 10:00 p.m. She did not mention Alvarado. She last saw Reynaldo at the bank that afternoon. She stated that he did not come home from work the evening of April 9, 2005. Preza told detectives she thought she had heard Reynaldo's voice that evening. Quijano said Preza must have been dreaming.

On April 19, 2005, during a recorded interview at the police station, which was played to the jury, Quijano admitted that she had spoken with Alvarado on the evening of April 9, 2005. She said she had called him to discuss a debt owed to her by Alvarado's son. She stated that Alvarado was not involved in Reynaldo's murder. She said that Reynaldo was murdered because of his mistakes. Quijano did not mention to the detective that she believed Reynaldo had raped her daughter.

On April 28, 2005, Quijano was arrested and interviewed. The interview was recorded and played for the jury. Quijano initially insisted that she had nothing to do with Reynaldo's death. Quijano told police that she was asleep when Reynaldo was killed, but later admitted that she spoke with Alvarado minutes before and after the murder. During this and other interviews, Quijano did not show any emotion over the death of her husband.

On April 29, 2005, during a recorded interview which was played for the jury, the interviewer tried to establish a rapport with Quijano by suggesting that Quijano's plan had only been to scare and beat her husband, but that it had gone too far. Quijano stated she was tired of Reynaldo's lies and "fed up with it." Quijano agreed with the interviewer that the perpetrators of Reynaldo's murder had gone too far, and that she only wanted them to scare Reynaldo and beat him up. She had asked Alvarado to look for people who could carry out her plan. Alvarado told her that it would cost $20,000 or $25,000 to kill Reynaldo. Quijano stated she paid Alvarado $800 to scare Reynaldo. She told Alvarado that she wanted the plan carried out at Reynaldo's work or at his

girlfriend's house because she did not want death in her house. Later that day, during another recorded interview which was played for the jury, Quijano admitted that she knew a murder could result if she hired someone to beat Reynaldo. Subsequently, Quijano told police that she knew her husband was cheating on her and stated that she had already said too much.

Accomplice testimony of Alvarenga

Alvarenga testified that on April 9, 2005, Alvarado walked up to Alvarenga as he was drinking beer and smoking marijuana at a parking lot on 84th Street. Alvarado told Alvarenga a woman wanted a man killed by 8:00 or 9:00 that evening and would pay $8,000. Sanchez then joined them and discussed the murder with Alvarado. Alvarado got a photograph of Reynaldo from his apartment. Sanchez accompanied Alvarado to his apartment and determined that he had the promised money. Sanchez, Monroy, and Alvarenga drove to Alvarenga's apartment to get a black sweatshirt for Sanchez. They then drove to the house of a man named Yoda and got a gun.

Monroy drove to Reynaldo's residence in Sun Valley, and saw Reynaldo park his car, but drove past the house. By the time they returned, Reynaldo had entered the house. They returned to Alvarado's apartment. Sanchez tried to get the money by telling Alvarado that they had been successful, but Alvarado telephoned Quijano, who said Reynaldo was asleep in the house. Alvarado gave Sanchez his cell phone. Alvarado told Sanchez that Quijano wanted them to return to the house and she would send Reynaldo out to run an errand for her.

Sanchez, Monroy, and Alvarenga drove back to Reynaldo's residence. Using Alvarado's cell phone, Sanchez spoke to Quijano, who told him that she wanted Reynaldo killed because he had raped her young daughter. Quijano told Sanchez that she was paying Alvarado $20,000. She told him that she would wake Reynaldo up and have him go out to buy something. She planned to leave the porch light on so that Sanchez and the others could see the house. Monroy and Alvarenga used Alvarado's cell phone to call their mothers.

Sanchez called Quijano when they arrived. A few minutes later, Reynaldo came out of the house. Sanchez, who had been driving, got out of the car, and told Monroy to get into the driver's seat. Sanchez exited the van and walked toward Reynaldo, who was in his car. Sanchez shot Reynaldo three or four times. Sanchez ran back to the van, jumped in, and drove off. Quijano told Sanchez that Reynaldo had been killed and asked him to have Alvarado call her to confirm the murder. They drove to Alvarado's apartment to collect the money. Sanchez gave $540 each to Monroy and Alvarenga. Afterward, they went to Bailey's house to smoke marijuana. Sanchez told Bailey that he shot Reynaldo.

Accomplice testimony of Monroy

Monroy testified that on April 9, 2009, he went to a parking lot on 84th Street. At the parking lot he saw Torres and Luis inside a white Honda. Monroy saw Sanchez and Alvarenga talking and joined them. Alvarenga told him of the murder plot. Sanchez left with Alvarado to go to his apartment, then returned saying that he had seen the money. Sanchez showed Monroy a picture of Reynaldo and said that Reynaldo drove a brown Mercedes. Sanchez said he would do the job for $8,000, and it had to be done that night, because Reynaldo was leaving town the next day. They drove to Alvarenga's house for a black sweatshirt and gloves, and to Yoda's house to pick up a gun.

They drove to Reynaldo's house, but missed Reynaldo when Monroy turned left instead of going straight. They returned to Alvarado's apartment. Sanchez tried to get the money from Alvarado by telling him they had completed the job. Alvarado told Sanchez that Reynaldo had not been killed. Alvarado gave Sanchez a cell phone. Monroy used the phone to call his girlfriend and mother. While Monroy was on the phone with his mother, Quijano called and asked to speak to the shooter. Monroy gave the cell phone to Sanchez. Sanchez told the others that Quijano wanted Reynaldo killed because he had raped her three-year-old daughter. She also told Sanchez to call her once they reached her residence and then she would send Reynaldo outside. Sanchez told Monroy and Alvarenga that he would give them $1,000 to assist him.

The group drove back to Reynaldo's residence. After they parked, Sanchez called Quijano. Monroy moved the car forward into the intersection. Monroy saw Reynaldo enter the Mercedes. Sanchez ran up and fired a few times at the driver's side, then ran back to the van. They dropped the gun off at Alvarenga's house then picked up the money from Alvarado. Sanchez gave Monroy and Alvarenga $540 each. They left the money at Bailey's residence while they smoked marijuana in a park. Monroy later saw Sanchez with a green Camry, a cell phone, a Ninja motorcycle, and some new clothing.

DISCUSSION

I. The trial court did not err in failing to instruct the jury that it could convict Quijano of the target offense of aggravated assault if it had a reasonable doubt concerning Quijano's intent that Reynaldo be killed

Quijano contends that under the natural and probable consequences theory argued by the prosecutor, the jury should have been instructed that it could convict her of the target offense of aggravated assault if it had a reasonable doubt concerning her intent that Reynaldo be killed. We disagree.

"[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former." (*People v. Lopez (*1998) 19 Cal.4th 282, 288.) A trial court has a sua sponte duty to instruct on all lesser included offenses which find substantial support in the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) But, a trial court's sua sponte duty to instruct on a lesser included offense is triggered only if there is substantial evidence to support a jury's determination that the defendant was in fact only guilty of the lesser offense. (*People v. Williams* (1997) 16 Cal.4th 153, 227.) Thus, a lesser included instruction need not be given when there is no evidence that the offense is less than that charged. (*People v. Mendoza* (2000) 24 Cal.4th 130, 174.)

"To determine whether a lesser offense is necessarily included in a greater charged offense, one of two tests must be met. [Citation.] The 'elements' test is satisfied if the statutory elements of the greater offense include all the elements of the lesser offense so

that the greater offense cannot be committed without committing the lesser offense. [Citation.] The 'accusatory pleading' test is satisfied if 'the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater [offense] cannot be committed without also committing the lesser [offense].' [Citation.]" (*People v. Cook* (2001) 91 Cal.App.4th 910, 918.)

At trial, defense counsel requested an instruction on aggravated assault as a lesser included offense of murder under the elements test. As conceded on appeal by Quijano, the trial court correctly stated that assault is not a lesser included offense of murder under the elements test.[3] Defense counsel then urged that under *People v. Cook*, *supra*, Cal.App.4th 910, the instruction on aggravated assault as a lesser included offense should be given under the accusatory pleading rule based on the overt acts alleged. The trial court again denied defense counsel's request.

On appeal, Quijano "proposes a third test of what constitutes a lesser included offense, neither an 'elements' test nor an 'accusatory pleading' test." She contends that "when a prosecutor relies on [a natural and probable consequences] theory and specifies a 'target' offense, and the commission of the target offense becomes a necessary precondition to conviction of the charged offense, the target offense should be treated as a lesser included offense." She contends that because the jury was forced to make an all-or-nothing choice, the resulting verdict was unwarranted and inaccurate. Instead, she argues, the jury should have been given an intermediate option to forward the state interest of assuring rationality of jury verdicts.

We decline Quijano's invitation to establish a third avenue of establishing a lesser included offense. Under the natural and probable consequences doctrine, an aider and

---

[3] "Murder requires proof of an unlawful killing of a human being committed with malice (§ 187, subd. (a).) Assault with a deadly weapon requires proof that a deadly weapon was used. Because in the abstract a murder can be committed without a deadly weapon, assault with a deadly weapon is not an offense necessarily included within the crime of murder." (*People v. Sanchez* (2001) 24 Cal.4th 983, 988, overruled on other grounds as stated in *People v. Reed* (2006) 38 Cal.4th 1224, 1228.)

abettor is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. (*People v. Prettyman* (1996) 14 Cal.4th 248, 261.) As Quijano concedes, aggravated assault is not a lesser included crime of murder under either the elements test or the accusatory pleading test. A finding that the commission of the target offense naturally and likely leads to the charged offense is not equivalent to a finding that "'the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater [offense] cannot be committed without also committing the lesser [offense].'" (*People v. Cook*, *supra*, 91 Cal.App.4th at p. 918.)

When the prosecutor relies on the natural and probable consequences theory, the trial court must instruct the jury *describing or defining* the elements of the target offense. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 266.) But the trial court is not obligated to instruct on lesser related offenses. (*People v. Hawkins* (1995) 10 Cal.4th 920, 952, overruled on other grounds as stated in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) The trial court is only required to instruct on all lesser included offenses which find substantial support in the evidence. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 148-149.) Moreover, because the jury does not need to unanimously agree on the particular target crime the defendant aided and abetted to convict a defendant of a crime under the natural and probable consequence doctrine (*People v. Prettyman*, *supra*, 14 Cal.4th at pp. 267-268), it would be improper to instruct the jury on a particular target crime as a lesser included offense.

Furthermore, Quijano's argument that the prosecutor's reliance on the natural and probable consequences doctrine is a functional amendment to the accusatory pleading is not well taken. "The accusatory pleading test arose to ensure that defendants receive notice before they can be convicted of an uncharged crime. 'As to a lesser included offense, the required notice is given when the specific language of the accusatory pleading adequately warns the defendant that the People will seek to prove the elements

of the lesser offense.' [Citation.]" (*People v. Reed, supra,* 38 Cal.4th at p. 1229.) Under Quijano's proposal, however, defendants would not receive the requisite notice.

Finally, Quijano acknowledges that the issue of her guilt was submitted to the jury on four distinct theories: premeditated murder, aiding and abetting premeditated murder, murder by lying in wait, and murder as a natural and probable consequence of a conspiracy to commit aggravated assault. She contends that "the existence of the three theories of guilt besides a natural and probable consequence theory does not alleviate prejudice." We conclude that the trial court did not err in refusing to instruct the jury that it could convict Quijano of the target offense of aggravated assault if it had a reasonable doubt concerning Quijano's intent that Reynaldo be killed. Even had the trial court erred in refusing to so instruct, "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.) Here, by convicting Quijano of first degree premeditated murder with a financial gain special circumstance, the jury necessarily found she had the specific intent to kill.

The trial court did not err in failing to instruct the jury that it could convict Quijano of the target offense of aggravated assault if it had a reasonable doubt concerning Quijano's intent that Reynaldo be killed.

II. Quijano waived her objection to CALCRIM No. 400 by failing to request clarifying language below, but the trial court did not cause prejudicial error by giving CALCRIM No. 400

Quijano contends that CALCRIM No. 400 incorrectly states that "[a] person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it" because an aider and abettor may be convicted of a lesser offense or a greater offense than the perpetrator. Thus, she claims that the instruction deprived the jury of the option of convicting her of the lesser included offense of second degree murder. In her opening brief she also contends that because the jury

was not given a verdict form for second degree murder, CALCRIM No. 400 required the jury to convict her of first degree murder regardless of her individual mental state. However, in her supplemental opening brief, Quijano acknowledges that the jury was given a verdict form for second degree murder. We conclude that Quijano forfeited her contention by failing to request that the trial court clarify CALCRIM No. 400, but conclude that the trial court did not cause prejudicial error by giving that instruction.

Quijano admits that she did not object to CALCRIM No. 400 at trial, but claims that she did not waive the issue on appeal because the trial court failed in its duty to correctly instruct the jury regarding applicable legal principles. We conclude that she has waived the issue on appeal. In *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 (*Samaniego*), we held that the defendant waived his objection to CALCRIM No. 400 because a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. We stated that "CALCRIM No. 400 is generally an accurate statement of law, though misleading in this case. [The defendant] was therefore obligated to request modification or clarification and, having failed to have done so, forfeited this contention." (*Samaniego*, at p. 1163.)

In *Samaniego*, we nevertheless found that giving CALCRIM No. 400 was harmless error. *Samaniego* is instructive here. In *Samaniego*, we noted that "though [*People v. McCoy* (2001) 25 Cal.4th 1111] concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state." (*Samaniego*, *supra*, 172 Cal.App.4th at p. 1164.) In *Samaniego*, the prosecutor's theory with regard to the murder of victim Nelson was that the defendant and his codefendants drove to a location intending to find and kill another person. When he was not there, they killed Nelson. (*Id.* at p. 1162.) We found that because there was no evidence as to which of the three defendants was the direct perpetrator of the shooting and therefore no evidence as to

which defendant was the direct perpetrator, CALCRIM No. 400 "is misleading here and should have been modified." (*Samaniego,* at p. 1165.) We further stated: "CALCRIM No. 400 misdescribes the prosecution's burden in proving the aider and abettor's guilt of first degree murder by eliminating its need to prove the aider and abettor's (1) intent, (2) willfulness, (3) premeditation and (4) deliberation, the mental states for murder." (*Samaniego,* at p. 1165.)

However, we concluded that the error was harmless beyond a reasonable doubt because the jury necessarily resolved these issues against the defendants under other instructions. The jury necessarily found that the defendants acted willfully with intent to kill. The jury was instructed with CALCRIM No. 702 that the People's burden was to prove that if the defendant was not the killer, he acted with intent to kill in a multiple murder special circumstance, and with CALCRIM No. 521 that defendants acted willfully if they intended to kill. The trial court also instructed with CALCRIM No. 401, which instructs that to prove guilt as an aider and abettor the prosecution was required to prove that the perpetrator committed the crime; the defendant knew the perpetrator intended to commit the crime; before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and the defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. Thus, we concluded that "[i]t would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required." (*Samaniego, supra,* 172 Cal.App.4th at p. 1166.) We concluded in *Samaniego* that any instructional error was harmless because it was beyond a reasonable doubt that the jury verdict would have been the same absent the error. (*Id.* at p. 1165.)

We similarly conclude here that under the particular circumstances of this case, CALCRIM No. 400 was misleading because it misdescribed the People's burden in proving Quijano's guilt of first degree murder under an aider and abettor theory by eliminating the need to prove the aider and abettor's intent, willfulness, premeditation,

and deliberation, the mental state for murder. Plus, there was some evidence that Quijano confessed to having the intent of scaring Reynaldo rather than having him killed and therefore her guilt may have been less than her codefendants. And, defense counsel repeatedly urged in closing argument that Quijano lacked intent to kill and only wanted to scare Reynaldo and his girlfriend

However, it is beyond a reasonable doubt that the jury verdict would have been the same absent the error and that the jury rejected the defense theory that Quijano did not intend to kill. As was the jury in *Samaniego*, the jury was instructed with CALCRIM No. 401 that to prove guilt as an aider and abettor the prosecution was required to prove that Quijano knew the perpetrator intended to commit the crime, and with CALCRIM No. 521 that Quijano acted willfully if she intended to kill. Moreover, the jury was instructed with CALCRIM No. 720 that to prove the special circumstance of murder for financial gain, the prosecution must prove Quijano intended to kill and the killing was carried out for financial gain. Because the jury convicted Quijano of special circumstance first degree murder, it found she intended to kill. Further, unlike *Samaniego*, where there was no evidence of who pulled the trigger, here there was witness testimony that Quijano hired Alvarado to find people to kill Reynaldo, Sanchez spoke to Quijano, who told him she wanted him killed because he had raped her daughter, Quijano told Alvarado Reynaldo was still alive and the job was not complete after the first botched attempt, that Alvarado paid the men only after Quijano confirmed Reynaldo's death, and Quijano's cell phone was connected to calls made to Alvarado's cell phone at the time of the murder.

Accordingly, we conclude that instruction with CALCRIM No. 400 was harmless error.

III. The trial court properly instructed the jury on the financial gain special circumstance

Quijano contends that the trial court erred by instructing the jury on a modified financial gain special circumstance instruction. We disagree.

Section 190.2, subdivision (a)(1) provides that a defendant who is found guilty of first degree murder shall be punished by death or imprisonment for life without the possibility of parole if the murder was intentional and carried out for financial gain.

The statutory language of section 190.2, subdivision (a)(1) was intended to cover a broad range of situations. (*People v. Howard* (1988) 44 Cal.3d 375, 410, overruled by statute on other grounds as stated in *People v. Shoemake* (1993) 16 Cal.App.4th 243, 253.) Financial gain for purposes of the special circumstance allegation may include the proceeds of a life insurance policy. (*People v. Mickey* (1991) 54 Cal.3d 612, 678.) Moreover, "[i]n the absence of overlap among the charged special circumstances, 'the relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain.' [Citation.] It is not required that the murder be committed exclusively or even primarily for financial gain." (*People v. Crew* (2003) 31 Cal.4th 822, 850-851.)

CALCRIM No. 720 provides: "The defendant is charged with the special circumstance of murder for financial gain. To prove that this special circumstance is true, the People must prove that: [¶] 1. The defendant intended to kill; [¶] AND [¶] 2. The killing was carried out for financial gain." The trial court gave the instruction with the addition of the following language as proposed by the People and accepted by defense counsel: "If you find that the actual killer was hired and had a financial motive to murder, you need not also find that anyone who, directly or indirectly, intentionally aided, counseled, induced, solicited or assisted the actual killer had an independent, personal financial motive."

Quijano contends that the last sentence of the modified instruction "allow[ed] the jury to find the special circumstances true based upon Sanchez's expectation of being paid by Alvarado, even if it had a doubt whether Quijano had any financial motive for wanting Reynaldo to be killed," rendering Quijano's motive irrelevant. She claims that one of her theories at trial was that while she only wanted Alvarado to find people to beat Reynaldo, Alvarado had Reynaldo killed because Alvarado had a romantic interest in her.

She argues that "[i]t is not sufficient that someone intended death and that the actual killer received compensation" and that the special circumstance does not apply here because Quijano was separated from the actual killer by an intermediary.

We conclude that Quijano's arguments are without merit. Section 190.2, subdivision (c) provides that "[e]very person, not the actual killer, who, with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4." Therefore, '"one who intentionally aids or encourages a person in the deliberate killing of another for the killer's own financial gain, is subject to the special circumstance punishment."' (*People v. Singer* (1990) 226 Cal.App.3d 23, 43.) Defense counsel argued at trial that Reynaldo's infidelity and the proceeds of a life insurance policy were not sufficient incentives for Quijano to want Reynaldo killed. Rather, the defense contended that Quijano hired Alvarado to find someone to scare and beat Reynaldo. Thus, because the prosecution theory and evidence were that Quijano gave Alvarado money in exchange for an aggravated assault on Reynaldo, the modification was proper. Moreover, the modified instruction does not render Quijano's intent irrelevant, because section 190.2, requires that the jury must find that Quijano intentionally aided or encouraged a person in the deliberate killing of another. Furthermore, under CALCRIM No. 720, the jury was required to, and did, find that Quijano intended to kill.

Finally, Quijano's complaint that the special circumstance does not apply because Quijano was separated from the actual killer by an intermediary is without merit. The use of "the terms 'aid,"' '"abet,"' '"encourag[e],"' '"induc[e],"' and '"solicit[]"' "strongly suggest murder *for hire* and the possibility of go-betweens, as opposed to personal involvement with the actual killer. Also, while jurors here were *instructed* that they had to find such a relationship with 'a person who carried out the actual killing . . . ,' the *statute* speaks of a relationship with 'any actor in the commission of [the] murder'

(§ 190.2, subd. (b)). '[A]ny actor' could easily include a nonkilling accomplice or coconspirator." (*People v. Singer*, *supra*, 226 Cal.App.3d at p. 44.)

We conclude that the trial court did not err in instructing the jury with the modified version of CALCRIM No. 720.

IV. The trial court did not err in failing to instruct the jury with CALCRIM No. 640

In her supplemental opening brief, Quijano urges that the trial court erred in failing to instruct with CALCRIM No. 640. Specifically, Quijano complains that although the jury was instructed with CALCRIM No. 521 that murders not falling within the description of first degree murder are murders of the second degree, "the jury was never told that if it had a reasonable doubt regarding Quijano's guilt of first degree murder, it could convict her of second degree murder. It was not told that second degree murder is "lesser" than first degree murder." Quijano contends that the trial court was required to advise the jury that second degree murder is a lesser included crime and that the jury could not reach a lesser crime unless it acquitted Quijano of the greater crime pursuant to CALCRIM 640.[4] We disagree.

---

[4] Quijano asserts that as tailored to the facts of this case, CALCRIM No. 640, would have provided: "You have been given several verdict forms for the count of murder. In connection with Count 2, I have given you a verdict form providing a choice. These are: Guilty/Not Guilty of first degree murder and second degree murder. [¶] You may consider these different kinds of homicide in whatever order you wish. I am going to explain how to complete the verdict forms using one order, but you may choose the order to use. As with all the charges in this case, to return a verdict of guilty or not guilty on a count, you must all agree on that decision. If you all agree the People have not proved the defendant committed an unlawful killing, then you must complete each verdict form stating that (he/she) is not guilty. If you all agree the People have proved the defendant killed unlawfully, you must decide what kind or degree of unlawful killing the People have proved. If you all agree that the People have proved that the unlawful killing was first degree murder, complete the verdict form stating that the defendant is guilty of first degree murder. If you all agree that the defendant is not guilty of first degree murder, but you agree the People have proved the killing was second degree murder, you must do two things. First, complete the verdict form stating that the defendant is not guilty of first degree murder. Then, complete the verdict form stating that the defendant is guilty of

As previously stated, a trial court has a sua sponte duty to instruct on all lesser included offenses which find substantial support in the evidence. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 148-149.) But, a trial court's sua sponte duty to instruct on a lesser included offense is triggered only if there is substantial evidence to support a jury's determination that the defendant was in fact only guilty of the lesser offense. (*People v. Williams*, *supra*, 16 Cal. 4th at p. 227.) Thus, a lesser included instruction need not be given when there is no evidence that the offense is less than that charged. (*People v. Mendoza*, *supra*, 24 Cal.4th at p. 174.)

Here, the evidence did not support a jury's determination that Quijano was in fact only guilty of second degree murder. Rather, the evidence established that Quijano committed willful, deliberate, and premeditated murder of Reynaldo by hiring Alvarado to find people to kill him. The evidence also showed that Quijano told Sanchez that she wanted him killed because he had raped her daughter. Furthermore, cell phone evidence connected Quijano's cell phone to Alvarado's cell phone at the time of the murder. The evidence also supported that Quijano's codefendants committed first degree murder by lying in wait at Quijano's direction while she sent Reynaldo to run an errand for her. Thus, even if, as Quijano urges, she merely wanted Alvarado to hire someone to beat her

---

second degree murder unless you all agree that the defendant is not guilty of first degree murder. Do not complete the verdict form stating that the defendant is guilty of second degree murder. Do not complete the other verdict forms for this count. If you all agree the People have proved the defendant committed murder, but you cannot all agree on which degree they have proved, do not complete any verdict forms. Instead, the foreperson should send a note reporting that you cannot all agree on the degree of murder or that has been proved. [¶] If you all agree that the defendant is not guilty of first degree murder, but you cannot all agree on whether or not the People have proved the defendant committed second degree murder, then you must do two things. First, complete the verdict form stating that the defendant is not guilty of first degree murder. Second, the foreperson should send a note reporting that you cannot all agree that second degree murder has been proved. Do not complete any other verdict forms for this count. [¶] The People have the burden of proving that the defendant committed first degree murder rather than a lesser offense. If the People have not met this burden, you must find the defendant not guilty of first-degree murder."

husband, under the natural and probable consequences theory, the evidence supported the jury's conclusion that she committed first degree murder. The evidence did not support a jury determination that she was in fact only guilty of second degree murder.

In any event, even though the trial court was not obligated to instruct the jury with CALCRIM No. 640, the jury was instructed with CALCRIM No. 521 that if it found Quijano committed murder, it must decide whether it is murder of the first or second degree. CALCRIM No. 521 instructed the jury that Quijano had been prosecuted for first degree murder under two theories: (1) the murder was willful, deliberate, and premeditated; and (2) the murder was committed by lying in wait. CALCRIM No. 521 also instructed the jury that "[a]ll other murders are of the second degree," and that "[t]he People have the burden of proving beyond a reasonable doubt that the killing was first-degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder." Thus, the jury was instructed by CALCRIM No. 521 that it must decide whether or not the killing of Reynaldo was murder of the first or second degree and that if Reynaldo's killing did not fit within the parameters of first degree murder, the murder must be of the second degree. And, as previously stated, the verdict form gave the jury the choice of finding Quijano guilty of second degree murder.

The trial court did not err in failing to instruct the jury with CALCRIM No. 640.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ